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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RICARDO MARTINE MARCOS, JOSE MORALES, & JUAN GONZALEZ HERNANDEZ Plaintiff, v. KOREANA PLAZA MARKET OAKLAND, INC., BYONG YU & DOES 1 to 10 Defendants.	No. C-06-07682 RMW ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR COMPEL ARBITRATION **[Re Docket No. 10]**

Defendant Koreana Plaza Market moves to dismiss plaintiffs Ricardo Marcos, Jose Morales, and Juan Hernandez' case or in the alternative, to stay the action and compel arbitration between the parties. For the reasons stated below, the court denies Koreana Plaza Market's motion.

I. BACKGROUND

Plaintiffs Jose Morales ("Morales"), Juan Gonzalez Hernandez ("Hernandez"), and Ricardo Marcos ("Marcos") were employed by defendant Koreana Plaza Market ("Koreana Market") and its owner Byong Yu. First Am. Compl. ("FAC") ¶ 2. Morales worked from approximately November 1, 1999 to September 19, 2006. Mot. Dismiss at 1. Hernandez worked from approximately October 21, 2003 to January 20, 2007. *Id.* Marcos worked from approximately September 19, 2004 to July

23, 2005. *Id*. All three plaintiffs claim to have worked over eight hours a day and over forty hours a week on a regular basis, and that they did not perform "exempt" job duties during the course of their work. FAC ¶¶ 8-9.

Plaintiffs allege, *inter alia*, that Koreana Market only paid them straight time for their overtime work. FAC ¶ 14. Plaintiffs are seeking compensatory damages in unpaid overtime wages, liquidated damages for unpaid overtime wages, pre-judgment interest of 10% of the unpaid overtime compensation and unpaid salaries, wages for failure to provide required meal and rest periods, waiting time penalty damages, restitution of unpaid overtime, reasonable attorney's fees, and costs of the suit. FAC at 8-9.

Koreana Market asserts that the parties have agreed to arbitrate this dispute. On December 29, 2005, Hernandez and Morales each signed an "Acknowledgment of Receipt of Handbook." Yu Decl., Ex. B. Both Hernandez and Morales also signed an "Agreement to Arbitrate Disputes" which states, "By signing the space below you are acknowledging that you have agreed to have any dispute arising out of or related to your employment with the Koreana Plaza Market Oakland, Inc. ('The Company'), with the sole exception of disputes involving your alleged violation of the company's confidentiality and conflict of interest policy, to be decided by neutral arbitration." Yu Decl., Ex. C. There is no evidence that Marcos signed the arbitration agreement.

II. ANALYSIS

Koreana Market moves to compel arbitration pursuant to the written arbitration agreement. Plaintiffs Morales and Hernandez contend that the "Agreement to Arbitrate Disputes" is procedurally and substantively unconscionable. Opp'n at 2. They claim that the arbitration agreement is procedurally unconscionable because they only spoke Spanish, could not understand the document, and did not have an opportunity to investigate what they were signing. *Id*. at 2. Plaintiffs also claim that the arbitration agreement is substantively unconscionable because it lacks mutuality, limits remedies available to plaintiffs, and requires them to pay unreasonable arbitration fees.

A. Legal Standard

The arbitration agreement states that the "arbitration shall be conducted by the American Arbitration Association in accordance with the Commercial Arbitration Rules and Title 9 of the California Code of Civil Procedure." Yu Decl., Ex. C. Under the Federal Arbitration Act ("FAA") the court applies ordinary state law principles that govern the formation of contracts in assessing whether an arbitration agreement is enforceable. *Davis v. O'Melveny & Myers*, ___ F.3d ___, 2007 WL 1394530, *3 (9th Cir. 2007).

Under California law, if a contract contains an arbitration clause, a court shall order arbitration unless the right to compel arbitration has been waived, grounds exist for revocation of the agreement, or a party to the arbitration agreement is also a party to a pending court action that arises out of the same transaction and there is a possibility of conflicting rulings on a common issue of law or fact. Cal. Civ. Proc. Code § 1281.2. The petitioner has the burden of proving the existence of the agreement through a preponderance of the evidence, and the opposing party must prove facts necessary to its defense through a preponderance of the evidence. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. App. 4th 951, 972 (1997).

Under the FAA, a court's role in determining whether an arbitration agreement is enforceable is limited to (1) whether a valid arbitration agreement exists and (2) whether the agreement encompasses the dispute at issue. *See* 9 U.S.C. § 4; *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983). Section 2 of the FAA provides that arbitration agreements shall be valid "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Arbitration agreements may be invalidated by applying generally available contract defenses, such as fraud, duress, or unconscionability. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Here, plaintiffs argue that the arbitration agreement is unenforceable because it is unconscionable.

B. Unconscionability

The arbitration agreement provides:

> "By signing the space below you are acknowledging that you have agreed to have any dispute arising out of or related to your employment with the Koreana Plaza Market Oakland, Inc. ("The Company"), with the sole exception of disputes involving your alleged violation of the company's confidentiality and conflict of interest policy, to be decided by neutral arbitration."

Yu Decl., Ex. C. Since neither party disputes the existence of the arbitration agreement, arbitration is appropriate here absent a finding that grounds exist for the revocation of the agreement. Under California law, an agreement is enforceable unless it is both procedurally and substantively unconscionable. *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000). Both procedural and substantive unconscionability must be present in order for the court to refuse to enforce a contract under the doctrine of unconscionability. *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal. App. 4th 746, 753 (2003). The more substantively oppressive a contract term is, the less evidence of procedural unconscionability is required to conclude that the term is unenforceable, and vice versa. *O'Hare v. Municipal Resource Consultants,* 107 Cal. App. 4th 267, 272 (2003); *McManus v. CIBC World Markets Corp.*, 109 Cal. App. 4th 76, 87 (2003).

1. Procedural Unconscionability

Plaintiffs argue that the arbitration agreement is procedurally unconscionable. Procedural unconscionability concerns the manner in which the disputed contract clause is presented to and negotiated with the party in the weaker bargaining position. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006). Procedural unconscionability analysis focuses on oppression or surprise. *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853 (2001).

Plaintiffs argue that procedural unconscionability exists because the defendants had superior bargaining power when asking them to sign the arbitration agreement. Opp'n at 6. They allege that Koreana Market told them to sign the arbitration agreement in order to get paid. Wang Decl., Exs. 1-2. In *Davis,* the court held an O'Melveny & Myers Dispute Resolution Program ("DRP") to be procedurally unconscionable when an employee, a paralegal at the firm, was given three months to consider the arbitration agreement, which was presented to firm employees on a "take it or leave it"

basis. *Davis*, 2007 WL 1394530 at *4. Although employees were invited to ask questions about the DRP, the terms were not negotiable. *Id*. at *5. The court held that the DRP was unconscionable despite finding that the DRP gave ample notice of the program and its terms, and that there was no evidence that the firm put undue pressure on its employees. *Id*. at *4. The terms of the DRP were not concealed in an employee handbook, so there was no element of surprise or concealment. *Id*. The court held that a "take it or leave it" agreement cannot be saved from a charge of procedural unconscionability simply because an employee was given time to consider the agreement. *Id.* at *5. Here, defendants contend that plaintiffs had several days to consider the agreement, while plaintiffs assert that they were told to sign the agreement immediately. Even assuming plaintiffs had several days, this might not be enough time to consider the agreement under *Davis*, particularly given the lack of explanation of its terms and the limited English ability of plaintiffs. *Id*. at *6.

Plaintiffs have presented evidence that they were not fully literate in English. Plaintiffs argue that they could not understand the arbitration agreement and that no one read or explained the document to them. Koreana Market acknowledges that plaintiffs had a limited ability to read English but asserts that plaintiffs could read enough English to understand the general nature of the agreement. Koreana Market also argues that plaintiffs never raised issues about having to read documents in English. Although Koreana Market presents evidence that several Spanish-speaking employees regularly translated English documents for other employees, it provides no evidence that plaintiffs obtained such assistance or were encouraged seek it. Defendants have not presented specific facts showing that plaintiffs knew or understood the terms of the agreement or consequences of not signing the agreement in light of their limited English. Because the evidence is undisputed that plaintiffs' understanding of English is at best limited, the agreement was procedurally unconscionable as there is substantial risk that plaintiffs did not understand what it was they were signing.

In response to plaintiff's argument that they were told to sign the agreement to be paid, Koreana Market contends that the agreement was completely voluntary. Several Koreana Market employees signed declarations that the arbitration provisions were voluntary and that employees

could take the documents home before signing them. Iskander Decl., Exs. A-D. Even if entry into the agreement was optional and not required, defendants have not presented facts opposing plaintiffs' allegations that they had to sign the arbitration agreement in order to get paid. The agreement is somewhat analogous to the "take it or leave it" situation presented in *Davis* in that plaintiffs here had no meaningful alternative to signing the agreement. Because defendants have not presented specific facts showing that plaintiffs had a meaningful understanding of the alleged voluntary nature of the agreement, the plaintiffs cannot be said to have voluntarily agreed to arbitration.

Defendants have also acknowledged that they did not explain the terms and the consequences of not signing the agreement to the plaintiffs. In *Davis*, the agreement was found to be unconscionable as to a paralegal at O'Melveny & Myers. *Davis*, 2007 WL 1394530 at *5. Here, plaintiffs are supermarket employees who likely understood less about arbitration and the consequences of signing the agreement than did the paralegal in *Davis*. Further, unlike in *Davis*, defendants did not present facts indicating that they invited plaintiffs to ask questions regarding the agreement or otherwise provided an explanation about the impact of agreeing to arbitrate or the limitations of rights set forth in the agreement. This lack of explanation further supports a finding of procedural unconscionability.

Overall, plaintiffs have presented direct, admissible evidence that the arbitration agreement was not explained to them and that they were required to sign it in order to continue to be paid. By contrast, defendants have offered no testimony concerning what plaintiffs were told regarding the agreement or directly responding to plaintiffs' declarations that they had to sign the agreement to get paid. Thus, the court finds that plaintiffs' sworn statements that they had limited English language abilities and were required to sign the agreement in order to get paid, along with the lack of evidence that defendants explained the terms and consequences of the agreement to them, demonstrate procedural unconscionability.

2. Substantive Unconscionability

Substantive unconscionability focuses on whether an agreement is one-sided or would result in overly harsh results. *Armendariz*, 24 Cal. 4th 83 at 114. Arbitration agreements require at least a

modicum of bilaterality. *Id*. at 117.

Plaintiffs argue that the agreement to arbitrate is substantively unconscionable because it limits statutorily-available remedies. Specifically, they argue that under the Fair Labor Standards Act ("FLSA"), an award of reasonable attorney's fees is mandatory but that the arbitration agreement precludes the recovery of such fees. 29 U.S.C. § 216(b). Koreana Market contends that plaintiffs' damages are not limited at all[1] and that a strong policy in favor of arbitration should be sufficient to compel arbitration. Reply at 7. Koreana Market further asserts that agreements requiring parties to bear their own attorney's fees have not been considered to be unconscionable in other jurisdictions. *See Faber v. Menard, Inc.*, 367 F.3d 1048 (8th Cir. 2004).

The arbitration agreement states that "neither the Company nor the employee shall be entitled to recover their attorney's fees from the other." Yu Decl., Ex. C. This is a clear attempt to limit plaintiffs' potential recovery of attorney's fees. Arbitration agreements may not require employees to waive potential recovery for statutory rights in an arbitral forum, especially for statutory rights established for a "public reason." *Davis*, 2007 WL 1394530 at *13. Here, plaintiffs argue that the FLSA permits an award of reasonable attorney's fees. Per *Davis*, this statutory right was established for a "public reason." *Id*. Therefore, the arbitration agreement's limitation of recovery for attorney's fees is evidence of substantive unconscionability.

C. Severability

Koreana Market argues that the court may sever any invalid provisions of the arbitration agreement and order arbitration. Reply at 9. If an unconscionable provision is collateral to the main purpose of the contract, it may be severed and the remainder of the contract enforced. *Armendariz*, 24 Cal. 4th at 124. Whether the entire agreement is tainted with illegality requires the court to look into whether the offending provisions permeate throughout the contract. *Id*.

The court has found the agreement to be both procedurally and substantively unconscionable. Notwithstanding Koreana Market's argument that the attorney's fees provision could be severed, as

[1] Defendants do not concede that the FLSA, which mandates recovery of attorney's fees, applies here.

set forth above, the arbitration agreement is tainted with substantive unconscionability in that it limits plaintiff's available remedies. This substantive unconscionability, along with the significant evidence of procedural unconscionability, leads the court to conclude that the offending provisions cannot be severed from the arbitration agreement and that the arbitration agreement is unenforceable.

D. Staying the Action

Under 9 U.S.C. § 3 and Cal. Civ. Proc. Code § 1281.4, if a court determines a suit is referable to arbitration, it must stay the proceeding until arbitration has been had in accordance with the terms of the agreement. Because the court finds the arbitration agreement unenforceable due to unconscionability, it does not stay the action.

III. ORDER

For the foregoing reasons, the court denies Koreana Market's motion to dismiss and denies its motion to stay the action and compel arbitration.

DATED: 6/13/07

Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

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Counsel are responsible for distributing copies of this document to co-counsel that have not registered for e-filing under the court's CM/ECF program.

Dated: 6/18/07

/s/ MAG
Chambers of Judge Whyte